IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 15, 2008 Session

VERA J. ROGERS v. BILL TURNER, ET AL.

Appeal from the Circuit Court for Blount County
No. E-21537 W. Dale Young, Judge

No. E2007-02233-COA-R3-CV - FILED OCTOBER 13, 2008

This lawsuit was filed by Vera J. Rogers ("Petitioner") seeking court-ordered visitation with her grandchildren pursuant to Tennessee's Grandparent Visitation Act, Tenn. Code Ann. § 36-6-306. The lawsuit was filed against Bill Turner ("Father") and Elizabeth Turner ("Mother"), the biological parents of the grandchildren. At trial, both parents testified that they had not and still did not oppose visitation between Petitioner and her grandchildren, so long as Petitioner abided by certain reasonable restrictions. The Trial Court found that the parents were not opposing visitation and that the parents' restrictions on the Petitioner's visitation were reasonable. Because the parents were not opposing visitation, the Trial Court entered an order establishing a visitation schedule and allowing the parents to impose reasonable restrictions. We hold that in order for Tenn. Code Ann. § 36-6-306 to be implicated, visitation by grandparents must be "opposed by the custodial parent or parents." Tenn. Code Ann. § 36-6-306(a). Because the Trial Court found no such opposition, the statute was not implicated and the Trial Court erred by not dismissing this case. We, therefore, reverse the judgment of the Trial Court, and this case is dismissed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, SP. J., joined.

Charles Dungan, Maryville, Tennessee, for the Appellants, Bill Turner and Elizabeth Turner.

Neill R. Monaghan, Maryville, Tennessee, for the Appellee, Vera J. Rogers.

OPINION

Background

In November of 2006, Petitioner filed a petition pursuant to Tennessee's Grandparent Visitation Act seeking visitation with her now eleven year old granddaughter, {Redacted], and her now five year old grandson, [Redacted] (the "Children"). The petition was filed against both of the Children's biological parents.[1] Mother is Petitioner's biological daughter. According to the petition:

> Since the birth of the minor children, the Petitioner has had a significant existing relationship with [her grandchildren], and the loss of that relationship is likely to occasion severe emotional harm to the children, and presents the danger of other direct and substantial harm to the children.
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> The Petitioner had frequent visitation with the minor children for a period in excess of one (1) year.
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> The Respondents have severed the relationship between the Petitioner and the minor children for reasons other than abuse or presence of a danger of substantial harm to the minor children.

Petitioner sought an order establishing visitation with the Children and also requested payment of her attorney fees.

Respondents answered the petition and generally denied that Petitioner was entitled to any relief. According to the answer:

> The Respondents acknowledge that there has been some visitation between the Petitioner and the children in the past.
>
> The Respondents deny that they "severed" the relationship between the Petition and the minor children and aver that they have offered the Petitioner opportunities to see the children.
>
> The Respondents aver that the Petition fails to state a claim upon which relief can be granted.

The trial took place on August 30, 2007. Petitioner was the first witness. Petitioner testified that she had been married to Sidney David Rogers for thirty-nine years, although they separated toward the end of the marriage and prior to their divorce. Petitioner testified that she had frequent contact with the Children after they were born. Petitioner was living with Respondents

[1] Mother and Father will be referred to collectively as "Respondents" or "Parents."

when her grandson was born and assisted with the care of both Children. Petitioner lived with Respondents for about seven months after Petitioner's grandson was born.

Petitioner opened a bookstore in 1995 and has worked there since that time. Mother worked with Petitioner in the bookstore until 2005. Mother generally worked at the bookstore three days a week and, when Mother was working, Petitioner was caring for the Children. Respondents never expressed any concern to Petitioner as to how Petitioner cared for the Children.

Petitioner described her relationship with Mother as very close, at least up until a year or two ago. When Petitioner divorced her husband, a court order allowed Petitioner to obtain personal effects from the marital residence. The court order also provided that if Petitioner's ex-husband refused to leave the premises while Petitioner was there to get her personal effects, then a police officer was to be present. Pursuant to that court order, Petitioner went to the marital residence with a police officer because her ex-husband would not leave. At that same time, her ex-husband was caring for their grandson at Petitioner's former marital residence. Then, according to Petitioner:

> [Mother] left the store and she was supposed to be working and came to [the marital residence] and found an officer there and she went berserk. She verbally attacked me, she verbally attacked the police officer, he arrested her and put her in jail. The next morning she got out of jail and she came to the store and then she started attacking me, claiming that it was my fault that I had her put in jail.…
>
> She came to the store with the children, she viciously attacked me, she tore the store up, she grabbed me and jerked me halfway across the desk trying to pull my hair.… I started to stand up and she reached over and grabbed a hand full of hair and yanked it out of my head.… The children were standing there watching the whole time.

Petitioner testified that she called the police and that the police officer tried to get her to agree to have Mother arrested. Petitioner refused the police officer's suggestion because she did not want to traumatize the children any more than they already were. Petitioner claimed that Mother has physically attacked her on four occasions and verbally attacked her many more times.

Petitioner filed the petition seeking visitation in November of 2006. During the one-year period preceding the filing of the petition, Petitioner saw the Children one time, and that was when she fortuitously ran into them at Wal-Mart. Following the filing of the petition, Petitioner visited with the Children on three occasions. She visited with them once each month in January, February, and March of 2007. Father met Petitioner at the mall for these three visits. Mother was not present. In addition, Petitioner claimed that she had arranged for a fourth visitation which was supposed to have taken place a few weeks before trial. Mother allegedly agreed to meet Petitioner at the mall and to bring the Children. Petitioner claimed Mother never showed up. Petitioner

acknowledged that Respondents had asked her not to attend her granddaughter's soccer practices, but Petitioner attended them anyway.[2]

Petitioner acknowledged that she is seeing a psychologist, Dr. Fain, and at times she suffers from severe depression. Dr. Fain testified that he first began treating Petitioner in October of 2002. Petitioner was seeking counseling for marital issues at the time. Dr. Fain diagnosed Petitioner as having adjustment disorder, depression, and anxiety related to changes in her life. Dr. Fain stated that Petitioner was not exhibiting any problems "beyond what a person would be experiencing that was having a thirty-nine year marriage come to an end." Dr. Fain stated that Petitioner continues to suffer from mild depression, but that she presents no threat or danger to anyone.

Even though Dr. Fain never evaluated the Children, he testified in general terms that with any child, if a stable and loving figure is taken out of that child's life, it can result in depression or anxiety to the child. On cross-examination, Dr. Fain acknowledged that he never actually evaluated either Respondents or the Children.[3]

Father testified that he currently is employed at Denso Manufacturing in Maryville and that Mother works for the Maryville Times. Father stated that he and Mother are separated and the Children reside primarily with Mother. Father and Mother have agreed to a co-parenting schedule for Father. Father explained that Mother and Petitioner had a falling out when Petitioner brought the police to Petitioner's marital residence when Respondents' son was at that residence. Father described Petitioner's relationship with the Children prior to that incident as "normal." After that incident, Petitioner saw the Children much less.

According to Father, his daughter is apprehensive about the situation between Mother and Petitioner and the whole situation is upsetting to the child. Father stated that his daughter typically was upset during or right after having visits with Petitioner. By way of example, Father testified that on one occasion he had just picked up the Children for his visitation and both Children were in the car. The daughter noticed Petitioner was stopped at a traffic light nearby and became very upset when she saw Petitioner. Father also testified that shortly after the incident at Petitioner's marital residence, Petitioner told Mother that she was going to take the Children out of state. Mother called Father and was very upset. Father went to the bookstore to talk to Petitioner and Petitioner told him she was not going to take the Children anywhere and was just trying to "scare some sense" into Mother. From that point on, Father supervised any visitation between Petitioner and the

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[2] Petitioner was requested not to attend soccer practice for several reasons, including the fact that Petitioner's ex-husband was going to be present at some of the practices. Not surprislingly, Petitioner's attendance did result in problems.

[3] In *Carr v. McMillan*, No. M2007-00859-COA-R3-CV, 2008 WL 2078058, at * 7 (Tenn. Ct. App. May 14, 2008), this Court observed that the Grandparent Visitation Statute "requires that the petitioner prove a danger of substantial harm to the specific child with whom visitation is sought, not just to children in general. *Ottinger v. Ottinger*, No. E2003-02893-COA-R3-CV, 2004 WL 1626253, at *5 (Tenn. Ct. App. July 21, 2004)." A Tenn. R. App. P. 11 request for permission to appeal to the Supreme Court was filed in *Carr* but has not yet been ruled upon by that Court.

Children. Father testified that on more than one occasion his daughter was upset because Petitioner had spoken badly about Mother. Father added that Petitioner often referred to the Children as "her children."

Father testified that in his opinion, overnight visitations with Petitioner would be detrimental to the Children's well-being. Although Father does not oppose Petitioner visiting with the Children so long as it is under the right conditions, he added that on at least one occasion his daughter did not want to go to one of the visits with Petitioner. Father explained that he has not seen any adverse reaction on the Children's part to the lack of or reduced visitation with Petitioner.

Mother testified that she and Petitioner became estranged when Petitioner divorced Mother's father. Mother stated that after the November 2005 incident, there was a break in the relationship between her and Petitioner. Petitioner did not ask to see the Children, and Mother did not offer. However, Mother stated that she never refused to allow Petitioner to see the Children. Eventually, Petitioner did ask to see the Children and Mother responded by a letter to Petitioner. According to Mother:

> We wrote a letter and said, yes, you may see the children. We've never said she couldn't. We set some ground rules as the children's parents. We asked her to come alone because it was upsetting for the children to be watched by a stranger. We said we would stay outside. We invited her to come for an hour. We asked that she not speak to the children about any events that occurred between her parents and her grandmother or her grandfather and her grandmother. She was simply there to enjoy the children.

Mother stated that when Petitioner came to visit the Children after receiving the above letter, Petitioner brought someone with her. Mother testified that Petitioner also talked to the children about previous events between Mother and Petitioner and this was upsetting to the Children. Mother confirmed Father's previous testimony that Petitioner would refer to the Children by stating "[t]hose are my children." Mother stated that the reduction in contact with Petitioner has been good for her daughter. Mother stated "[i]t's almost a relief [for her daughter] not to have that pressure and that anxiety over her."

Mother testified that Petitioner is welcome to see the Children as long as she abides by the parameters established by Mother and Father. When those parameters were explained to Petitioner, Mother described Petitioner's reaction as follows: "They're her children, she'll see them when and where she wants, and she'll do what she wants." According to Mother, Petitioner has stated on several occasions that she was going to take the Children out of the state. Petitioner made these comments in front of her granddaughter and this was very upsetting to the child who has informed Mother that she does not want to spend the night with Petitioner.

On cross-examination, Mother testified that she and Petitioner had been 50/50 owners of the bookstore. When Petitioner was divorcing her now ex-husband, Mother refused to pick sides,

and Petitioner unilaterally ceased the equal ownership arrangement. Mother did not file a lawsuit over her loss of ownership interest in the bookstore.

Following the conclusion of the proof at trial, the Trial Court made several observations from the bench. According to the Trial Court:

> The term dysfunction comes to mind when I think of this case, both sides. Were it not for the agreement that these parents, through their testimony, that they want … the grandmother to have a relationship with the grandchildren, the Court would probably have to decide this case against the petitioner and for the respondent[s]. But both parents have affirmatively stated that they don't have any problems with visitation on the part of the grandmother, under the terms and conditions that they as parents set out. And I don't have a problem with that. I think parents need to set parameters for their children.… And Mrs. Rogers you just have to learn to live with the fact that they have this obligation, this responsibility to raise their kids. It's their job, not yours. They're not your kids.…
>
> I'm going to order visitation a couple of times a month on the terms and the conditions that this mom and dad agree on, to be to the best interest of your kids.

The Trial Court then entered an order granting Petitioner's request for visitation. According to that order:

> The Petitioner shall be allowed visitation with her minor grandchildren … twice in every calendar month.
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> Said visitation shall be subject to conditions established by the Respondents.…
>
> The Petitioner shall contact the [Father] who shall act as the liaison to set up said visitation.
>
> None of the parties shall speak ill to the minor children about each other or anybody else.
>
> Each party shall pay their own attorney fees and be equally liable for court costs for which execution may issue if necessary.

Respondents appeal the final order entered by the Trial Court. Respondents raise two issues, which we quote:

1. Did the Court err in ordering visitation for the Appellee Grandmother, where there was no finding of the presence of a danger of substantial harm to the children?

2. Did the Court err in basing its ruling on the perceived willingness by the parents for the Grandmother to visit the children?

Discussion

In *Smallwood v. Mann*, 205 S.W.3d 358 (Tenn. 2006), our Supreme Court discussed the standard of review in cases involving visitation, including grandparent visitation pursuant to Tenn. Code Ann. § 36-6-306. According to the Court:

> Appellate review of a visitation order is governed by an abuse of discretion standard, with the child's welfare given paramount consideration. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). Review of questions of law, including issues of statutory construction, is de novo with no presumption of correctness attached to the judgment of the trial court. *State v. Tait*, 114 S.W.3d 518, 521 (Tenn. 2003) (citing *Beare Co. v. Tenn. Dep't of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993)).

Smallwood, 205 S.W.3d at 361.

In relevant part, the Grandparent Visitation Act, codified at Tenn. Code Ann. § 36-6-306, provides as follows:

> **Visitation Rights of grandparents. –** (a) Any of the following circumstances, when presented in a petition for grandparent visitation to the circuit, chancery, general sessions courts with domestic relations jurisdiction or juvenile court in matters involving children born out of wedlock of the county in which the petitioned child currently resides, necessitates a hearing if such grandparent visitation is opposed by the custodial parent or parents:
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> * * *
>
> (6) The child and the grandparent maintained a significant existing relationship for a period of twelve (12) months or more immediately preceding severance of the relationship, this relationship was severed by the parent or parents for reasons other than abuse or presence of a danger of substantial harm to the child, and severance

of this relationship is likely to occasion substantial emotional harm to the child.

(b)(1) In considering a petition for grandparent visitation, the court shall first determine the presence of a danger of substantial harm to the child. Such finding of substantial harm may be based upon cessation of the relationship between an unmarried minor child and the child's grandparent if the court determines, upon proper proof, that:

> (A) The child had such a significant existing relationship with the grandparent that loss of the relationship is likely to occasion severe emotional harm to the child;
>
> (B) The grandparent functioned as a primary caregiver such that cessation of the relationship could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm; or
>
> (C) The child had a significant existing relationship with the grandparent and loss of the relationship presents the danger of other direct and substantial harm to the child.

(2) For purposes of this section, a grandparent shall be deemed to have a significant existing relationship with a grandchild if:

> (A) The child resided with the grandparent for at least six (6) consecutive months;
>
> (B) The grandparent was a full-time caretaker of the child for a period of not less than six (6) consecutive months; or
>
> (C) The grandparent had frequent visitation with the child who is the subject of the suit for a period of not less than one (1) year.

(3) A grandparent is not required to present the testimony or affidavit of an expert witness in order to establish a significant existing relationship with a grandchild or that the loss of the relationship is likely to occasion severe emotional harm to the child. Instead, the court shall consider whether the facts of the particular case would lead a reasonable person to believe that there is a significant existing relationship between the grandparent and

> grandchild or that the loss of the relationship is likely to occasion severe emotional harm to the child.
>
> (c) Upon an initial finding of danger of substantial harm to the child, the court shall then determine whether grandparent visitation would be in the best interests of the child based upon the factors in § 36-6-307. Upon such determination, reasonable visitation may be ordered.…

Tenn. Code Ann. § 36-6-306 (Supp. 2008).

In *Smallwood*, *supra*, the Supreme Court discussed the important distinction between awarding a non-custodial parent visitation versus awarding a grandparent visitation. The Court stated:

> Under section 36-6-301 of the Tennessee Code Annotated, barring the likelihood of endangerment to the child, a court is required to award visitation to a non-custodial parent: "After making an award of custody, the court shall, upon request of the non-custodial parent, grant such rights of visitation as will enable the child and the non-custodial parent to maintain a parent-child relationship...." In contrast, under the version of section 36-6-306 in effect at the time this visitation petition was filed in February of 2003 and under the current version of the statute, prior to granting a grandparent's request for visitation, a court must find "the presence of a danger of substantial harm to the child" *if such visitation is denied*, Tenn. Code Ann. § 36-6-306(b)(1) (2005), and determine whether such visitation would be in the "best interests" of the child, *id.* at (c). The reason for this distinction in visitation rights is well-established. Under both the United States and Tennessee Constitutions, parents have a fundamental right to the control and care of their children. *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993)). In custody disputes we have recognized that the natural parents' rights are superior to those of third parties unless the parent relinquishes his or her rights. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Interference with this fundamental right is allowed only when there is a compelling state interest in doing so. *Nash-Putnam*, 921 S.W.2d at 174 (quoting *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994)). Visitation rights arise from the right of custody and are controlled by the same constitutional protections. See George L. Blum, Annotation, *Grandparents' Visitation Rights Where Child's Parents Are Living*, 71 A.L.R.5th 99, 122 (1999).

> These constitutional protections are reflected in the statutes governing grandparents' visitation rights.
>
> * * *
>
> Allowing a grandparent to procure visitation without first requiring a showing of harm to the child *if such visitation is denied* not only violates section 36-6-306(b)(1) which specifically requires such a showing, it also constitutes an infringement on the fundamental rights of parents to raise their children as they see fit. *See Hawk*, 855 S.W.2d at 581.

Smallwood, 205 S.W.3d at 361-63 (footnotes omitted and emphasis added).

As set forth above, the very language of Tenn. Code Ann. § 36-6-306 is such that the statute is not implicated unless "visitation is opposed by the custodial parent or parents." The term "opposed" includes situations both where visitation is totally denied and where visitation is technically not opposed, but where the frequency and/or conditions imposed by the parents on the visitation are such that it equates to a denial of visitation.

In the present case, there was no finding that Mother or Father ever opposed visitation. The Trial Court obviously credited the testimony of Mother and Father when it found that they still were not opposing visitation between Petitioner and the Children, and that the conditions imposed by Mother and Father were appropriate and well within their rights as the parents. Once these findings were made, and the facts certainly do not preponderate against these findings, the statute simply was not implicated. Tenn. Code Ann. § 36-6-306 cannot be used by grandparents who think they are entitled to more or different visitation in the absence of a finding that the parents actually or effectively "opposed" visitation. Once the Trial Court found that Mother and Father had not opposed and still were not opposing visitation, this case should have been dismissed, and the Trial Court erred when it entered an Order establishing a specific visitation schedule. Accordingly, the judgment of the Trial Court is reversed, and this case is dismissed.

Conclusion

The judgment of the Trial Court is reversed, and this case is dismissed. This case is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellee, Vera J. Rogers.

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D. MICHAEL SWINEY, JUDGE